

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of the Application of)	
)	
COLUMBIA MILLIMETER)	
COMMUNICATIONS, LP)	File No. 9704031
)	(formerly File No. 9507742)
to Provide 39 GHz Point-to-Point)	
Microwave Radio Service on)	
Station WPNA659, Santa Cruz, California)	

ORDER ON RECONSIDERATION

Adopted: April 10, 2000

Released: April 11, 2000

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. Columbia Millimeter Communications, LP (Columbia) seeks reconsideration of an *Order*¹ of the Public Safety and Private Wireless Division, Wireless Telecommunications Bureau (Division) dismissing Columbia's previously filed petition for reconsideration as untimely.² For the reasons set forth below, we affirm our original decision.

II. BACKGROUND

2. On June 19, 1995, Columbia filed an application for a license to operate a new facility in the 39 GHz band in Santa Cruz, California.³ On August 14, 1995, Spectrum Communications, L.C. (Spectrum) filed a partially mutually exclusive application to operate a new 39 GHz facility in Monterey, California.⁴ On December 15, 1995, the Commission decided that all pending 39 GHz applications that were mutually exclusive (or partially mutually exclusive) would be held in abeyance pending the resolution of a rulemaking proceeding.⁵ On November 15, 1996, Spectrum's application was granted in part and

¹ Columbia Millimeter Communications LP, *Order on Reconsideration*, 14 FCC Rcd 2782 (WTB PSPWD 1999) (*Order*).

² Columbia Millimeter Communications LP Petition for Reconsideration (filed Mar. 10, 1999) (Further Petition).

³ *Order*, 14 FCC Rcd at 2782 ¶ 2.

⁴ *Id.*

⁵ Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 37.0 GHz-38.6 GHz and 38.6-40.0 GHz, *Notice of Proposed Rule Making and Order*, 11 FCC Rcd 4930, 4988-89 ¶¶ 122-24 (1995).

denied in part, and effective April 1, 1997, Columbia Millimeter's application was granted.⁶ Subsequently, the Division's Licensing and Technical Analysis Branch set aside its April 1, 1997, action granting Columbia a license and returned Columbia's application to pending status.⁷ Public notice of the action was released on October 14, 1997.⁸

3. On November 13, 1997, Columbia submitted to the Commission's lockbox at the Mellon Bank in Pittsburgh, Pennsylvania, its petition seeking reconsideration of the action setting aside the grant of its license.⁹ Columbia submitted a copy of the Petition to the Secretary's Office in Washington, D.C. on November 14, 1997.¹⁰ On February 8, 1999, we dismissed Columbia's Petition as untimely.¹¹ We stated that Columbia had thirty days in which to seek reconsideration and that the thirty-day period ended on November 13, 1997.¹² We also noted that the Commission's Rules require reconsideration petitions to be filed at the Secretary's Office in Washington, D.C.¹³ We concluded that because Columbia's petition was not received at the Secretary's Office until November 14, 1997, it was untimely.¹⁴ On March 10, 1999, Columbia timely filed its Further Petition seeking reconsideration of our *Order*.

III. DISCUSSION

4. Columbia first argues that the thirty-day period in which to file petitions for reconsideration ended not on November 13, 1997, but on November 14, 1997, and thus its petition was timely.¹⁵ Columbia argues that although the notice had a release date of October 14, 1997, "existence of the notice was not announced in the [Commission's] Daily Digest until October 15, 1997."¹⁶ It further states that it "understand[s]" that public notices are "often" not available to the public until they are

⁶ *Order*, 14 FCC Rcd at 2783 ¶ 4.

⁷ *Id.* at 2783 ¶ 5.

⁸ *Id.*

⁹ *Id.* at 2783 ¶ 6.

¹⁰ *Id.*

¹¹ *Order*.

¹² *Id.* at 2784 ¶¶ 7-8 (citing 47 U.S.C. § 405(a); 47 C.F.R. §§1.4(b)(4), 1.104(b), 1.106(f)).

¹³ *Id.* at 2784 ¶ 9.

¹⁴ *Id.*

¹⁵ Further Petition at 2-4.

¹⁶ *Id.* at 3.

announced in the Daily Digest, despite the notices' release date.¹⁷ It therefore argues that the thirty-day period ran from October 15, 1997 until November 14, 1997.¹⁸

5. In effect, Columbia argues that the period for seeking reconsideration did not commence until the October 14 Public Notice was included in a daily listing of Commission actions. We disagree. Section 1.4 of the Commission's Rules provides that if an action is summarized in a document entitled "Public Notice," the date of "public notice" of the action -- the date from which the thirty-day period begins to run -- is the date the document is released.¹⁹ Section 1.4 further provides that a document's release date appears on the face of the document and that a document is released by making the full text available to the public in the Office of Public Affairs.²⁰ We therefore reject Columbia's argument that the thirty-day period began to run on October 15, 1997, the day after the Public Notice was released.²¹ We also find Columbia's suggestion that the public notice was not released until October 15, 1997, unavailing, particularly because it is based on Columbia's "understand[ing]" of what it alleges is "often" the case, and not on specific facts about events on October 14, 1997.²²

6. Columbia next argues that the submission of its petition at the Commission's lockbox at the Mellon Bank on November 13, 1997, was sufficient to make it timely.²³ Though Columbia recognizes that the Commission's Rules provide that documents are considered filed at their receipt at the location designated by the Commission²⁴ and that the Rules require petitions for reconsideration be filed with the Secretary's Office,²⁵ it argues that given that the Communications Act does not provide where petitions for reconsideration must be filed, these are not the *only* methods by which documents may be filed.²⁶ We reject this argument as specious. Contrary to Columbia's argument, the lack of the word "only" in Section 1.7 of the Commission's Rules, which provides that documents are considered filed upon their receipt at the

¹⁷ *Id.*

¹⁸ *Id.* at 4.

¹⁹ 47 C.F.R. § 1.4(b)(4); *see also, e.g.*, Eight Applications for Authority to Construct and Operate Multipoint Distribution Service Stations on the Channel 1 and 2, E, F and H Group Channels at Various Transmitter Sites, *Order on Reconsideration*, 11 FCC Rcd 7008, 7009-10 ¶ 5 (MMB Video Services Div. 1996).

²⁰ 47 C.F.R. § 1.4(b)(2).

²¹ Further, assuming *arguendo* that the presumption that a Commission document correctly reflects its release date is rebuttable, Columbia has presented insufficient evidence to overcome it. *Cf. Commco, LLC, Memorandum Opinion and Order*, FCC 99-347, ¶ 11 (rel. Nov. 19, 1999).

²² *See* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, ET Docket No. 95-183, 14 FCC Rcd 12428, 12437 ¶ 12 (1999).

²³ Further Petition at 4-5.

²⁴ *See* 47 C.F.R. § 1.7.

²⁵ *See* 47 C.F.R. § 1.106(i).

²⁶ Further Petition at 4-5.

location designated by the Commission,²⁷ does not render the rule unclear. Moreover, Columbia ignores Section 0.401 of the Commission's Rules, which admonishes persons filing documents with the Commission to ensure that their documents are filed at the correct location as the Commission maintains different offices for different purposes, and warns that filings submitted to the wrong location will not be processed.²⁸ We therefore reject Columbia's argument that reconsideration petitions may be filed at locations other than the one designated by the Commission. Accordingly, we affirm our original holding that Columbia's petition was not filed until November 14, 1997, when it was received at the Secretary's Office.

7. Columbia asks that, in the event that we find its petition to be untimely, we waive the rule requiring reconsideration petitions to be filed with the Secretary and consider Columbia's petition on the merits.²⁹ We may grant a request for waiver when (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case and a grant of the requested waiver would be in the public interest, or (ii) in view of the unique or unusual circumstances of the case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.³⁰ We find that Columbia has not met either of these standards.

8. Regarding the first standard for granting a waiver, we note that Columbia does not argue that the underlying purpose of the Sections 1.7 and 1.106 of the Commission's Rules would not be served or would be frustrated by applying the rules to this case. Indeed, the purpose of these rules is to ensure that petitions for reconsideration arrive at the proper location within the required time. That did not happen in this case. Accordingly, we find that Columbia has not met the first standard for granting a waiver.³¹

9. Turning to the second standard, Columbia argues that the unique circumstances of this case are the underlying issues and the public importance of those issues. Citing two broadcast license cases, Columbia argues that even where there is no good cause for a waiver, the Commission has heard untimely petitions if they raise substantial public interest questions.³² In those cases, however, the petitions were filed within the time that the Commission could proceed on its own motion.³³ That is not true here.

²⁷ 47 C.F.R. § 1.7.

²⁸ 47 C.F.R. § 0.401.

²⁹ Further Petition at 6-8.

³⁰ 47 C.F.R. § 1.925(b)(3).

³¹ Moreover, there are substantial reasons to apply the rules. While the Secretary's Office currently stops accepting filings at 7 p.m., filings may be submitted to the Commission's lockbox at the Mellon Bank until midnight. Granting a waiver to allow a reconsideration petition to be filed at the Commission's lockbox would therefore permit a petitioner to avoid the filing deadline.

³² Further Petition at 6-7 (citing *Gross Telecasting, Memorandum Opinion and Order*, 55 FCC 2d 295, 295 n.1 (1975); Franklin D. R. McClure, et al., *Memorandum Opinion and Order*, 5 FCC 2d 148, 149 n.3 (Review Board 1966)).

³³ For example, in Franklin D. R. McClure, a petition to enlarge the issues was filed after the close of the record, and was therefore untimely, but before the initial decision was released, therefore allowing the Review Board to proceed. Franklin D. McClure, 5 FCC 2d at 148, 149 n.3.

Columbia similarly argues that the Commission has discretion to hear petitions filed outside the thirty-day time statutory period in which to file petitions for reconsideration, and that the underlying issue here merits exercise of that discretion.³⁴ Columbia is incorrect. While under certain circumstances, such as lack of proper notice, the Commission may waive the thirty-day period,³⁵ the courts have made clear that such circumstances are extremely unusual.³⁶ We find no such unusual circumstances surrounding the filing of Columbia's petition.

10. As a final matter, Columbia argues throughout its Further Petition that general principles of equity and procedural fairness require us to waive the filing location rules and consider its petition on the merits. We disagree. First, Columbia's argument amounts to no more than an argument that because it will win on the merits, we should consider its case on the merits. Such an argument, of course, can be made in any case and, if accepted, would undercut all of the Commission's procedural rules. Second, we conclude that the equities do not favor hearing Columbia's petition, in which Columbia asked us to reconsider the action setting aside the grant of its license, and restore the license. Columbia's application should not have been granted in the first instance because the application was mutually exclusive with Spectrum's application as of December 15, 1995, so pursuant to the Commission's orders, it should have been held in abeyance until the 39 GHz rulemaking was concluded.³⁷ Further, the Commission has since decided in the 39 GHz rulemaking that mutually exclusive 39 GHz applications should be dismissed and partially mutually exclusive applications dismissed with respect to the part that is mutually exclusive.³⁸ Therefore, we are not persuaded that the general notions of equity do not favor granting Columbia's Further Petition in this case.

11. In conclusion, we affirm the conclusion in our prior *Order* that Columbia was required to file its petition for reconsideration at the Secretary's Office by November 13, 1997, in order for the petition to be timely. We also affirm our prior finding that Columbia failed to do so and that its petition was untimely. We reject Columbia's request for a waiver of the rules requiring petitions for reconsideration to be filed at the Secretary's Office because we find that Columbia has not shown that grant of such a waiver is warranted. We also reject Columbia's other arguments as to why we should consider its petition on the merits.

IV. ORDERING CLAUSES

12. ACCORDINGLY, IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47

³⁴ *Id.* at 7.

³⁵ *See Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976).

³⁶ *Virgin Island Tel. Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993); *Reuters Ltd. v. FCC*, 781 F.2d 946, 952 (D.C. Cir. 1986).

³⁷ *See supra* para. 2.

³⁸ Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Report and Order and Second Notice of Proposed Rule Making*, 12 FCC Rcd 18600, 18605 ¶3, 18641-45 ¶¶ 87-97 (1997); *Memorandum Opinion and Order*, FCC 14 FCC Rcd 12428, 12430 ¶ 2, 12430-48 ¶¶ 7-38 (1999).

C.F.R. § 1.106, the Petition for Reconsideration filed by Columbia Millimeter Communications LP on March 10, 1999, IS DENIED.

13. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
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